Skills Savvy | *Making the Most of Your Twenty Minutes (The Art of Appellate Oral Advocacy)*

Deborah Race*

Twenty minutes – that is the time most appellate advocates have to present their case should they be granted oral argument. That often does not seem like enough time to present a case that you and/or the trial attorney, as well as the client, have lived with for years, but it is what you will get. So how do you make the best use of your twenty minutes?

1. Think of oral argument as a conversation.

The best advice I ever received was from Justice Paul Colley, for whom I clerked. Early on he advised me to consider oral argument nothing more than a conversation – one in which you are advocating for your position while remaining honest with the court.

2. Do not write out a prepared speech.

Don't write out what you intend to say. Instead, have bullet points of the topics you want to cover and then cover them.

3. Don't be married to any order – go with the flow.

Let the judges guide where you go in the argument by their questions. Never tell the court you will get to an answer later in the argument. If a judge asks a question, answer it immediately.

4. If a judge interrupts to speak, stop talking and listen.

If a judge has a question and interrupts you, stop talking and listen to the question – then answer it to the best of your ability.

5. If a judge wants to argue or belabor a point, answer, but try to move on.

Sometimes a judge will really take a strong position and want to argue the point. Never cut off that discussion, but if there is a tactful way to just agree to disagree and move on, try to do that. If you cannot, it is likely the other judges may give you some way to move on and return to the rest of the argument

6. Know the record and the key cases.

Be ready for any questions – you must know your record, as well as any key cases and be prepared to fully discuss them with the court. A hot court with lots of questions is far better than a cold court with none.

7. If you don't know an answer, admit it.

Despite your best efforts, there may be questions you simply cannot answer. If that happens, admit it, but offer to provide the court with an answer after argument.

Cont'd on page 3

8. Never jeopardize your integrity with the court.

While you should certainly advocate for your client, never obscure or blur the record or the law. You have to be honest with the court at all times. If there is a fact or case against you, don't try to hide it. Instead, explain why it should not carry the day.

9. Do not disparage opposing counsel.

Don't spend your time talking about how wrong, bad, evil, dishonest, terrible, etc., your opposing counsel is or has been. Instead, be gracious and courteous even if opposing counsel does not respond in kind. Appellate courts are traditionally extremely respectful and do not appreciate personal attacks or snide comments.

10. Try to respond to opposing counsel's arguments.

Listen to your opposing counsel carefully and if there are arguments or representations about which you want to respond, do so during your argument time. Explain to the court how you might distinguish a certain case counsel relied upon or how the record might reflect another angle to certain representations made.

11. Do not divide your time.

If at all possible, do not split your time with other counsel. Twenty minutes is not much time and dividing it can be disruptive to the flow of the argument and confusing. It may at times be unavoidable, but if you can, avoid it.

12. Ask the court if it will allow trial counsel to answer a question about the trial if you cannot.

If a question comes up during the argument regarding something that may not appear clear from the record and you don't know, ask the court if you can ask trial or other counsel with you to answer that question if possible.

13. If you want to use demonstratives, try to file beforehand and bring copies.

Many courts of appeals I have been in are not set up for AV aids – call first to ask. If you have something demonstrative that you want to use, file a notice of its use before the argument and then bring copies with you to distribute to the justices and opposing counsel.

14. Unless the court permits, wind it up when the red light comes on.

Even if you are not done, if the red light comes on, acknowledge it and end the argument. You might say something like "I see the red light is on, so unless the court has any additional questions, for all of these reasons, as well as those in our brief, I ask the court to affirm (or reverse, etc.) the decision of the trial court."

Cont'd on page 4

Cont'd | *Making the Most of Your Twenty Minutes*

15. If you cite to a new case during argument, provide a cite letter.

Sometimes in preparation for argument you discover a new case, or maybe a case you just didn't find in preparing the brief. If you are going to refer to it during argument, provide the court with a cite letter either before or after the argument. And a cite letter is just that – a letter stating that you plan to or did refer to this case during argument. Do not add additional argument.

Hopefully, these tips will make your argument preparation easier and your argument more effective and enjoyable.

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Legal Mojo | *Investigating an Employment Complaint*

Teresa Schiller***

What if an employee of a business makes a complaint (internally or publicly) about workplace misconduct? What should the business do?

It depends on many things, but one important decision is whether or not the business needs to investigate the complaint at all. For example, would a lower-level review of the complaint be sufficient? How serious is the complaint? Does it allege a violation of company policy? Does a company policy specify particular steps for addressing it?

Suppose an investigation is needed. A *successful* investigation clarifies the objective facts, and then resolves the complaint and improves the workplace so that everyone can get back to business. Here are some possible steps to take in investigating an employment complaint.

1. Decide preliminary issues.

First, decide preliminary issues. For example, what should be the goal(s) of the investigation? Some possible goals are to (a) figure out whether misconduct has occurred, (b) stop the misconduct and determine how to prevent it in the future, and (c) lay the groundwork for taking appropriate action.

What status should an accused employee have during the investigation? The goal is to balance the need to prevent further damage to the complainant and the business with the need to minimize adverse action against an employee who later could be exonerated. Some possibilities are to (a) give the employee paid time off until the end of the investigation, (b) transfer the employee, (c) suspend the employee, and (d) leave the employee's status unchanged. Depending on the type and seriousness of the allegations, the complainant may need to have the accused employee moved to a different area of responsibility, or moved out of the chain of command.

And one cardinal rule – no retaliation against the complainant, even if the complaint is later deemed unfounded.

Cont'd on page 5